Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RICHARD M. PARKER *et al.*,
Petitioners,

v.

DAVID S. WAKELIN *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the statute establishing a state retirement system does not expressly provide that a contractual relationship exists between the state and employees who are members of that system, do such employees ever acquire a right to retirement benefits that is protected by the Contracts Clause of the United States Constitution, and, if so, under what circumstances do they acquire such a right?; and

2. Does the "unmistakability doctrine" apply in determining whether a contractual relationship exists between a state and employees who are members of a state retirement system, and, if so, does the doctrine restrict a court to an examination of the statutory language in making that determination, or may a court inquire into the history, purpose, and circumstances surrounding enactment of the statute establishing the state retirement system?

PARTIES

PETITIONERS

Richard M. Parker,
Paul L. Hutchins,
R. Jeffrey Caldwell,
Ruth M. Guavin,
Rosanne M. H. Graef, and
Jean L. Hefele,
as active Maine public school teachers, who are members of the Maine State Retirement System, on behalf of themselves and all other similarly situated Maine public school teachers, and
the Maine Education Association

RESPONDENTS

David S. Wakelin,
Claude R. Perrier,
John H. Kimball,
William C. Bullock, Jr.,
George A. Burgoyne,
Eunice Cotton,
Charles M. Jackson,
Grover B. MacLaughlin, and
the Maine State Retirement System

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard M. Parker, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in *Parker v. Wakelin*, 123 F.3d 1 (1st Cir. 1997).

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 123 F.3d 1 (1st Cir. 1997), and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a. The opinion of the United States District Court for the District of Maine is reported at 937 F. Supp. 46 (D. Me. 1996), and is reprinted in Pet. App. at 18a.

JURISDICTION

The opinion of the Court of Appeals panel was issued on August 11, 1997. A timely Petition for Rehearing and

Suggestion for Rehearing *En Banc* was denied on October 17, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contracts Clause of the United States Constitution, U.S. Const. Art. I, § 10, cl. 1, provides in relevant part as follows:

> No state shall . . . pass any . . . Law impairing the Obligation of Contracts.

The Maine State Retirement System is codified at 5 M.R.S.A. § 17001 *et seq.*, and is reprinted in relevant part in Pet. App. at 44a.

STATEMENT OF THE CASE

A. Factual Background

The individual petitioners are active Maine public school teachers who are members of the Maine State Retirement System ("MSRS"). These petitioners serve as class representatives for all such public school teachers. The Maine Education Association, an employee organization that represents, *inter alia*, the interests of Maine public school teachers, also is a petitioner.

The MSRS was established by the Maine legislature in 1942. Its purpose is "to encourage qualified persons to seek public employment and to continue in public employment during their productive years." 5 M.R.S.A. § 17050. All Maine state employees, including the public school teachers comprising the class in this case, are required as a condition of their employment to be members of the MSRS. 5 M.R.S.A. §§ 17001(14), 17651.

The MSRS is a "defined benefit" System, in that the retirement benefits provided for members are defined upon employment. All MSRS members make mandatory contributions into a pension fund, to which the State also

contributes in order to maintain the fund's actuarial soundness with regard to future benefit obligations. 5 M.R.S.A. §§ 17701-A, 17701-B, 17153(1-A)(B). Members of the MSRS qualify to receive retirement benefits upon (1) reaching the statutory retirement age, and (2) satisfying the years of service requirement (either at least ten years of creditable service, or at least one year of creditable service prior to reaching the statutory retirement age while still in public service). 5 M.R.S.A. § 17851. Alternatively, a member is eligible to receive retirement benefits regardless of age when he or she retires with at least 25 years of creditable service. *Id.*

Members who terminate their public employment *before* satisfying the years of service requirement are entitled to a return of their contributions, with interest. 5 M.R.S.A. § 17705(2). Members who terminate their public employment *after* satisfying the years of service requirement, but who have not yet reached the statutory retirement age, have an option. Such members can receive a return of their contributions, with interest, *id.*, or can wait until they satisfy the age requirement, and then begin to receive the retirement benefits to which they are entitled. 5 M.R.S.A. § 17851(2) & (2-A).

Prior to 1975, the MSRS contained no express provision as to the ability of the Maine legislature to amend the retirement benefits structure. In 1975, a provision dealing with this matter—5 M.R.S.A. § 17801—was added to the MSRS. Certain minor language changes were made in 1989, and since that date Section 17801 has provided as follows:

> No amendment to this Part may cause any reduction in the amount of benefits that would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

In order to save money by reducing State contributions to the MSRS, the Maine legislature adopted six amendments to the System in 1993, all of which operate to the disadvantage of MSRS members without providing any offsetting benefits. Pet. App. at 4a. The 1993 amendments may be divided into two groups: (1) three of the amendments apply only to members of the MSRS who had not met the years of service requirement as of the effective date of the amendments;[1] the other three amendments apply to all members of the MSRS, including those who had met the statutory age and years of service requirements as of the effective date of the amendments, but who had not yet retired.[2]

B. Proceedings Below

Petitioners challenged all of the 1993 amendments to the MSRS in the United States District Court for the District of Maine. Petitioners alleged, *inter alia*, that by virtue of their membership in the MSRS, all teachers in the plaintiff class had a contract with the State, which was impaired by the 1993 amendments in violation of the Contracts Clause of the United States Constitution. The district court found for petitioners in part, drawing a distinction between those members of the MSRS who had satisfied the years of service requirement as of the effective date of the 1993 amendments—whose retirement benefits the court described as "vested"—and those members who had not met the years of service requirement—whose retirement benefits, by the court's definition, had not yet

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[1] These amendments (1) increase the retirement age, 5 M.R.S.A. § 17851(1-A), (2) increase the early retirement penalty, 5 M.R.S.A. § 17852(3-A), and (3) remove unused sick pay from the calculation of retirement benefits, 5 M.R.S.A. § 17001(13)(B).

[2] These amendments (1) increase the rate of required contributions, 5 M.R.S.A. § 17001-B, (2) cap the salary increase that may be included in calculating retirement benefits 5 M.R.S.A. § 17701(13)(C), and (3) delay the first cost-of-living adjustment to retirement benefits, 5 M.R.S.A. § 17806(3).

vested. Pet. App. at 35a. The district court held that the 1993 amendments violated the Contracts Clause only as applied to those members of the MSRS whose retirement benefits had vested. *Id.* at 35a-39a.

Both parties appealed. The First Circuit reversed the district court to the extent that it found the 1993 amendments violative of the Contracts Clause with regard to *any* members of the MSRS.

The court below began its analysis by noting that "[t]his appeal raises a legal issue of considerable importance," Pet. App. at 6a, which it formulated as follows:

> [W]hether a legislative amendment to a state employee retirement pension plan that is detrimental to employees triggers further scrutiny under the Contract Clause as applied to state employees whose pension rights under the plan have "vested" prior to such amendment. [*Id.*]

According to the First Circuit, "a blanket answer" to the above question "is not possible, because . . . a detailed examination of the particular provisions of a state pension program will be required prior to determining the nature and scope of the unmistakable contractual rights, if any, that are created by a given state legislature." *Id.* The court then held that this examination must be conducted pursuant to the "unmistakability doctrine," which, the court explained, requires the following:

> [F]or the purposes of the Contract Clause, there must be a clear indication that the legislature intends to bind itself in a contractual manner. [citation omitted] "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." [*Id.* at 8a (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) (internal quotation marks omitted))].

Turning to the MSRS, the dispositive question for the First Circuit was whether it "evinces a clear intent on the part of the Maine legislature to create contractual rights against the modification of pension benefits." *Id.* at 14a. Answering this question is difficult, according to the court, because "[t]he law governing the rights of members of public employee retirement plans varies greatly from state to state, and has not been the subject of federal regulation or harmonization." *Id.* at 10a. The court noted particularly the absence of "guidance" from this Court "as to the rights public employees have to their pensions." *Id.* Although this Court's last pronouncement on the matter—its century-old decision in *Pennie v. Reis*, 132 U.S. 464 (1889), indicating that state employee retirement systems do not create contractual rights, but provide mere gratuities that a legislative freely may modify—never has been explicitly overruled, the First Circuit observed that "this 'gratuity' approach has been rejected by most state courts, . . . [and] *Pennie* has . . . been ignored as a precedent." Pet. App. at 10a. The court below noted that the other federal Circuits to have addressed the question (*i.e.*, the Fourth and the Ninth) both have rejected the gratuity approach, *id.* at 10a-11a, and it "recognized the diversity of contract theories adopted by state courts—in particular the divergence of approaches with regard to when exactly binding rights to a certain level of retirement benefits 'vest.'" *Id.* at 12a.

The First Circuit then turned to the language of the MSRS, "ask[ing] whether the Maine Legislature has unmistakably evinced the intention to create binding contractual rights." *Id.* at 14a. Contrary to the position taken by the district court, the court below rejected the claim that the MSRS "should be read to protect a teacher —and possibly to create contract rights—whenever a teacher satisfies the service requirements even though the teacher is still in active service and no pension is currently payable." *Id.* at 15a. The court did so based on its conclusion that what the court saw as the critical stat-

utory provision—5 M.R.S.A. § 17801, which prohibits a reduction in retirement benefits that "would be due [to] a member"—"does not clearly *compel* such a reading." Pet. App. at 15a (emphasis added). Although acknowledging that "the statute [is] unclear," that the relevant decision of the Maine Supreme Court "leaves the issue open," that "this is a possible reading," that "there is some evidence indicating that certain legislators wanted to protect vested rights," and that "the Maine Legislature in enacting section 17801, responded to a report that recommended the protection of employees' accrued retirement benefits from retroactive reductions," the First Circuit held that the unmistakability doctrine was not satisfied. Pet. App. at 16a. As the court put it, "we do not think this language could be said to reflect the unmistakable intent of the Maine Legislature . . . ." *Id.*[3]

REASONS FOR GRANTING THE WRIT

This Petition presents two related—albeit analytically distinct—questions involving application of the Contracts Clause of the United States Constitution to state retirement systems.[4] Both of these questions concern the threshold inquiry of the Contract Clause analysis—*i.e.*, whether a contractual relationship has been established, so as to trigger constitutional scrutiny.[5]

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[3] The First Circuit left open the questions of "whether, in order to satisfy the unmistakability doctrine, a public pension statute must explicitly employ the language of contract . . . [and] whether Contract Clause principles would apply if Maine sought to reduce pension benefits already 'due' to present retirees. . . ." Pet. App. at 16a-17a.

[4] Because this case involves a state retirement system, we use that term in this Petition. The analysis extends, however, to any non-federal public sector retirement system, including the large number of such systems that have been established by local governments.

[5] If this question is answered in the affirmative, the next step is to determine whether the claimant's contractual rights have been substantially impaired, and, if so, whether that impairment was

The first, and fundamental, question presented is whether, and under what circumstances, a state retirement system establishes a contractual relationship between the state and the members of the system that comes within the ambit of the Contracts Clause. This question is limited to the typical situation in which the state legislature has not expressly indicated whether such a contractual relationship is established—a situation in which the court below recognized "the diversity of contract theories adopted by state courts" for making this determination. Pet. App. at 12a. In Part I, we demonstrate why this Court should grant review in order to revisit the obsolete position that it took more than a century ago, and provide guidance to the many state and federal courts that are struggling with this important question of federal law.

The second question presented, which has two parts, involves the analytical framework a court should apply in answering the first question. The holding of the court below—*i.e.*, that there is no contractual relationship between the class members and the state—resulted from its application of the "unmistakability doctrine." The first part of this question is whether, as the First Circuit believed, that doctrine applies in determining whether and when contractual rights arise under a state retirement system—notwithstanding that the state is acting in its capacity as an employer and is not exercising a "sovereign power" of government; the second part assumes that the unmistakability doctrine does apply, and asks whether that doctrine restricts a court to an examination of the statutory language, and bars inquiry into the history, purpose, and circumstances surrounding enactment of the statute in question. In Part II, we demonstrate why this impor-

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"reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). These latter questions are not implicated by this Petition, inasmuch as the First Circuit denied all relief on the ground that petitioners had *no* contractual rights. Accordingly, it is only the existence *vel non* of a contractual relationship that is before this Court.

tant question of federal law should be settled by this Court.

I. THE ESTABLISHMENT OF A CONTRACTUAL RELATIONSHIP

A. *Pennie v. Reis*

Framing the issue before it as "whether a legislative amendment to a state employee retirement pension plan that is detrimental to employees triggers further scrutiny under the Contract Clause as applied to state employees whose pension rights under the plan have 'vested' prior to such amendment," Pet. App. at 6a, the First Circuit itself proceeded to make a persuasive case as to why this question warrants review.

The court below noted that this is "a legal issue of considerable importance," *id.*,[6] observing that the answer

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[6] This would be true if for no other reason than the vast number of employees who are members of state retirement systems. Every state has at least one retirement system, and several states have more than one system, often providing separate coverage for public school teachers. According to the most recent statistics available, there are over 2,000 different state and local government retirement systems in existence, with more than ten million active members. *See* Employee Benefit Research Institute, *EBRI Databook on Employee Benefits* 148 (4th ed. 1997).

Moreover, the federal law question of whether and when members of a state retirement system acquire rights that are protected by the Contracts Clause has become an increasingly active source of litigation in both federal and state courts, as more and more states attempt to deal with budgetary problems by reducing their financial obligations under such systems. *See* Roberta Romano, *Public Pension Activism in Corporate Governance Reconsidered*, 93 Colum. L. Rev. 795, 802 (1993) ("In the 1990s, states experiencing fiscal difficulty have taken unilateral action against fund assets rather than employ the earlier New York approach of 'requesting' their use in public debt purchases. Among the tactics employed are reducing contributions to retirement funds, altering actuarial and income assumptions in order to decrease contribution levels, and transferring assets from pension fund to general state accounts. These policies are especially troubling because many state pension funds are in weak financial condition . . . ."); Darryl B. Simko,

"varies greatly from state to state, and has not been the subject of federal regulation or harmonization." *Id.* at 10a. "There is no modern Supreme Court case that provides guidance as to the rights public employees have to their pensions," *id.*, this Court having last spoken to the matter more than a century ago in *Pennie v. Reis*, 132 U.S. 464 (1889). The position taken in *Pennie*—*i.e.*, that state retirement systems "do not create vested rights against legislative modifications, and thus are gratuities that a state may freely revoke," Pet. App. at 10a—"has been rejected by most state courts." *Id.* Accordingly, although *Pennie* "has never been explicitly overruled," it has "been ignored as a precedent" by state supreme courts, and by the Fourth and Ninth Circuit Courts of Appeals, the "only two other circuits [to] have addressed this question." *Id.*

This Court has explained that when one of its decisions directly controls on an issue of federal law, all other courts are bound to apply that existing precedent, regardless of how they believe this Court might decide the issue if presented to it again in the future. *See Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997) ("We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))). Because *Pennie* remains "good law," it is technically controlling—although the position taken quite obviously is obsolete. This Court should grant review in order to revisit *Pennie*, and to "provide[] guidance as to the rights public employees have to their pensions," *Parker*, 123 F.3d at 6, Pet. App. at 10a, that reflects modern Contracts Clause jurisprudence.

Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint, 69 Temple L. Rev. 1059, 1059-60 (1996). *See also* cases cited *infra* at 12-15.

B. The Conflict Among State Courts of Last Resort and Federal Courts of Appeals

The question presented here—*i.e.*, whether or not in the absence of an express declaration by a state legislature, there is a contractual relationship between a state and the members of a state retirement system that is sufficient to trigger scrutiny under the Contracts Clause—is a question of federal law. For this reason, there is considerable significance to what the court below recognized as "the diversity of contract theories adopted by state courts" in determining "when exactly binding rights" to retirement benefits arise under the Contracts Clause. Pet. App. at 12a. We develop this point below, and also reference the conflict among the federal courts of appeals that have addressed the question.

In the century since it was decided, *Pennie*'s "reasoning has been widely—and justifiably—criticized," Note, *Public Employee Pensions in Times of Financial Distress*, 90 Harv. L. Rev. 992, 994 (1977), and its gratuity approach has found only two adherents among the courts that have addressed the issue in the modern era. *See Cook v. Employees Ret. Sys.*, 514 S.W.2d 329, 331 (Tex. Civ. App. 1974); *Ballard v. Board of Trustees*, 324 N.E.2d 813, 815 (Ind. 1975). *But see Board of Trustees of Pub. Employees Ret. Fund v. Hill*, 472 N.E.2d 204, 208-09 (Ind. 1985) (holding that judges have contractual rights arising upon participation in a *voluntary* retirement plan).

Most courts view state retirement systems as creating a unilateral contract.[7] The basic theory is that the promise

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[7] Although courts sometimes discuss an employee's right to receive retirement benefits in terms of "deferred compensation," "detrimental reliance," or "promissory estoppel," the different terminology generally is used to describe what is essentially the contractual theory set forth in text. This Petition uses the term unilateral contract because it is the most common, and, we believe, most analytically proper formulation.

of retirement benefits is part of the compensation package that public employers offer to attract qualified employees, and once the offeree accepts the offer by tendering performance—*i.e.*, by starting employment—a unilateral contract exists. *See generally* Arthur L. Corbin, *Corbin on Contracts* § 2.29 (Joseph M. Perillo rev. ed. 1993); *cf.* 5 M.R.S.A. § 17050 (purpose of MSRS is "to encourage qualified persons to seek employment and to continue in public employment during their productive years"). The courts differ, however, on when contractual rights accrue.

1. Consistent with the traditional notion of a unilateral contract, many jurisdictions hold that a contractual right to the retirement benefits provided by the system exists from the first day of employment. *See Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965) (en banc); *Betts v. Board of Admin. of the Pub. Employees Ret. Sys.*, 582 P.2d 614, 617 (Cal. 1978); *Police Pension & Relief Bd. v. Bills*, 366 P.3d 581, 584 (Colo. 1961); *Nash v. Boise City Fire Dep't*, 663 P.2d 1104, 1108-10 (Idaho 1983); *Brazelton v. Kansas Pub. Employees Ret. Sys.*, 607 P.2d 510, 514 (Kan. 1980); *City of Frederick v. Quinn*, 371 A.2d 724, 726 (Md. App. 1977); *Opinion of the Justices*, 303 N.E.2d 320, 327 (Mass. 1973); *Campbell v. Michigan Judges Ret. Bd.*, 143 N.W.2d 755, 757-58 (Mich. 1966); *Sylvestre v. State*, 214 N.W.2d 658, 666-67 (Minn. 1973); *Halpin v. Nebraska State Patrolmen's Ret. Sys.*, 320 N.W.2d 910, 914-16 (Neb. 1983); *Public Employees' Ret. Bd. v. Washoe County*, 615 P.2d 972, 974-75 (Nev. 1980); *Association of Pa. State Coll. and Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 966 (Pa. 1984); *Burlington Fire Fighters Ass'n v. Burlington*, 543 A.2d 686, 689-90 (Vt. 1988); *Leonard v. City of Seattle*, 503 P.2d 741, 746 (Wash. 1972) (en banc); *Wagoner v. Gainer*, 279 S.E.2d 636, 643-44 (W. Va. 1981).

The Ninth Circuit took this approach in *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223,

1227-28 (9th Cir. 1990) (following the lead of the Nevada Supreme Court in *Washoe County, supra.*)[8]

2. Some jurisdictions reject the principle that a contract exists as soon as an employee begins to tender performance, and focus instead upon an employee's completion of performance, which under this approach is defined as meeting the requirement for "vesting" pursuant to the terms of the retirement system. All state retirement systems (and all private sector retirement systems as well) provide that an employee's retirement benefits vest after he or she satisfies a years-of-service requirement, although the employee may not be eligible to retire and actually receive those benefits until he or she reaches a certain age.[9] The courts in these jurisdictions take the position

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[8] Notwithstanding their agreement that a contract exists from the first day of employment, these jurisdictions differ as to the state's ability thereafter to modify the terms of the retirement system. Several courts have held that the state may not unilaterally amend the system in derogation of the employee's contractual rights at any time. *See Yeazell*, 402 P.2d at 545 (a contract is complete when an employee accepts employment, and a "contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party"); *Sylvestre*, 214 N.W.2d at 666-67; *Campbell*, 143 N.W.2d at 757-58. Other courts allow for certain "reasonable modifications" of the existing contract. As the Ninth Circuit explained in *Keating*, the reasonable modifications approach means that even though an employee has a contractual right to the retirement benefits in effect on the first day of his or her employment, if subsequent enactments "constitute[] a reasonable modification of the pension plan, then they [do] not create a substantial impairment of contractual obligations." 903 F.2d at 1227.

The reasoning in this line of cases is not always clear. As the language of the Ninth Circuit indicates, the holdings may to some extent involve the second prong of the Contracts Clause analysis—*i.e.*, whether the contract has been substantially impaired.

[9] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in State and Local Governments, 1994*, at 113-14 (1996):

> Even when an employee leaves an employer before becoming eligible for . . . a retirement benefit, a plan may ultimately

that an employee's benefits are contractually protected once they vest and cannot be altered by a subsequent legislative enactment. *See, e.g., Petras v. State Bd. of Pension Trustees*, 464 A.2d 894, 896 (Del. 1983).

3. A related view posits that performance is complete —and thus contract rights accrue—only when an employee actually is eligible to retire and receive retirement benefits. *See Pineman v. Oeschlin*, 488 A.2d 803, 809-10 (Conn. 1985); *Baker v. Oklahoma Firefighters Pension & Ret. Sys.*, 718 P.2d 348, 352-53 (Okla. 1986); *Blackwell v. Quarterly County Court*, 622 S.W.2d 535, 543 (Tenn. 1981). This differs from the vesting analysis in that an employee must satisfy both the years-of-service requirement *and* reach the statutory retirement age.

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pay a pension. . . . If certain conditions are satisfied at the time of separation, workers have a vested interest in all or a portion of their accrued pension benefits and may begin receiving benefits years later.

Although all State and local government pension participants are entitled to vested benefits, some variations exist as to when vesting occurs. A large majority of the participants in defined benefit pension plans have to complete 5 years of service at any age before benefits are guaranteed (cliff vesting). Most of the remaining participantse are in plans requiring 10 years of service. Participants not in plans with cliff vesting generally are covered by a graduated vesting provision, which increases the portion of guaranteed benefits as years of service increase. Full vesting usually comes after 7 years.

The question of when retirement benefits vest in accordance with this well-established definition—which is determined by the years-of-service requirement in the particular retirement system—is distinct from when retirement benefits come within the ambit of the Contracts Clause—which is a question of federal law as to which courts have taken the various approaches discussed in text. The First Circuit's references to the "creat[ion of] vested rights against legislative modifications," Pet. App. at 10a, and to "when exactly binding [contract] rights to a certain level of retirement benefits 'vest,' " *id.* at 12a, suggest that the court may have failed to grasp this distinction.

4. Another approach is to treat retirement benefits as noncontractual up to the point of actual retirement, prior to which the legislature is free to "modify or alter the benefits provided by . . . [the] retirement plan." *Florida Sheriffs Ass'n v. Department of Admin.*, 408 So.2d 1033, 1035 (Fla. 1981). The Court of Appeals for the Fourth Circuit took this position in interpreting a North Carolina retirement statute. *Kestler v. Board of Trustees of N.C. Ret. Sys.*, 48 F.3d 800, 803-04 (4th Cir.), *cert. denied*, 116 S. Ct. 186 (1995). Although asserting that the First Circuit has "never chosen to adopt a particular approach to *public* pension rights," Pet. App. at 12a (emphasis in original), the holding by the court below is consistent with this approach.[10]

The court below advised that, in determining whether a contractual relationship exists between a state and the members of a state retirement system, a court should "perform[] a close analysis of the statutory provision at issue." *Id.* at 13a. This is sound advice, and the diversity among the various jurisdictions may to some extent be attributable to differences in statutory structure. To a larger extent, however, this diversity is attributable to

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[10] Indeed, the court below may be seen as going beyond this approach, inasmuch as it left open the question of whether the Maine legislature could, without running afoul of the Contracts Clause, "reduce pension benefits already 'due' to present retirees . . . ." Pet. App. at 17a. *See supra* note 3.

Two other jurisdictions, while rejecting the notion that state retirement systems create enforceable contractual rights prior to retirement, have suggested that state employees "have legitimate retirement expectations" that "may constitute property rights that the legislature cannot deprive them of without due process of law." *Spiller v. State*, 627 A.2d 513, 517 n.12 (Me. 1993). *See also Pineman v. Oeschlin*, 488 A.2d 803, 809-10 (Conn. 1985). In *National Educ. Ass'n-R.I. v. Retirement Bd. of the R.I. Employees Ret. Sys.*, 972 F. Supp. 100 (D.R.I. 1997), the United States District Court for the District of Rhode Island analyzed a modification to the state retirement system under a property right theory.

the absence of a controlling analytical framework that can be applied to the statute in question. This Court has not addressed this matter in more than a century. It should grant review in order to provide the state and lower federal courts with a set of guiding legal principles that they can use to determine whether and when members of a state retirement system acquire rights that are protected by the Contracts Clause.

II. THE UNMISTAKABILITY DOCTRINE

In attempting to ascertain whether the Maine legislature intended to establish a contract between the State and the members of the MSRS for purposes of the Contracts Clause, the court below applied the "unmistakability doctrine"—according to which "there must be clear indication that the legislature intends to bind itself in a contractual manner." Pet. App. at 8a. The First Circuit's application of this doctrine is problematic in two respects, and raises an important question of federal law that should be settled by this Court.

A. Applicability to a State Retirement System

This Court recently has indicated that the unmistakability doctrine may not apply to contracts of the type involved in this case. In *United States v. Winstar*, 116 S. Ct. 2432 (1996), the plaintiff savings-and-loan institutions alleged that the government had encouraged them to enter into mergers by promising that goodwill and capital credits could be counted toward the capital reserve requirements imposed by federal regulations. *Id.* at 2447. A subsequently enacted statute took a contrary position, providing that goodwill and capital credits could not be counted for this purpose. The plaintiff institutions were seized for failing to meet the capital reserve requirements, and they alleged that the statute had breached a contractual commitment by the government to allow the practice. *Id.*

This Court held that the unmistakability doctrine did not apply in determining whether the government's promise created a contractual relationship, because the promise did not involve a "sovereign power" of the government. *Id.* at 2456-58. In so holding, this Court strictly limited the reach of the doctrine, confining it to situations in which "enforcement of the contractual obligation alleged would block the exercise of a *sovereign power* of the Government." *Id.* at 2457 (emphasis added). This Court identified a "sovereign power" as a "power peculiar to the Government," such as the power "to tax or control navigation," *id.*, as opposed to what this Court labeled "humdrum" contracts, such as military supply contracts. *Id.*; *see also id.* at 2477 (Scalia, J. concurring) ("The unmistakability doctrine has been applied in precisely this sort of situation—where a *sovereign act* is claimed to deprive a party of the benefits of a prior bargain with the government." (emphasis added)).

It is well-settled that where, as here, government is acting in its capacity as an employer, it is not exercising sovereign powers. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) ("[C]onstitutional review of government employee decisions must rest on different principles than review of speech restraints imposed by the government as sovereign."); *United States v. McAllister*, 119 F.3d 198, 201 (2d Cir. 1997) ("[T]here is 'ample support' in Supreme Court precedents for an approach that distinguishes between the government acting as sovereign and the government acting as an employer." (citation omitted)), *cert. denied*, 66 U.S.L.W. 3338 (U.S. Jan. 12, 1998); *Sharar v. Bowers*, 114 F.3d 1097, 1102 (11th Cir. 1997) (en banc) ("We also know that because the government's role as employer is different from its role as sovereign, we review its acts differently in the different contexts."), *cert. denied*, 66 U.S.L.W. 3338 (U.S. Jan. 12, 1998); *United States v. Reyes*, 87 F.3d 676, 680 (5th Cir. 1996) ("There is ample support for constitutionally distinguishing government acting as employer from gov-

ernment acting as sovereign."). Because no "power peculiar to the Government" is involved in the establishment of a state retirement system—private sector employers perform the same function—the unmistakability doctrine should not be applied in determining the existence *vel non* of a contractual relationship between a state and members of a state retirement system. This Court should grant review to establish this important point of federal law.

B. Inquiry Into the History, Purpose, and Circumstances Surrounding Enactment of a State Retirement System

Assuming, *arguendo*, that the unmistakability doctrine does apply in this context, the decision of the court below in any event raises an important question as to the manner of its application. Focusing solely on the phrase "benefits which would be due to a member . . . on the date immediately preceding the effective date of the amendment" in Section 17801 of the MSRS, the First Circuit concluded that a legislative intent to protect the retirement benefits of anyone other than employees who actually have retired could not be "unmistakably" shown. Read entirely out of context, the term "due to a member" may perhaps appear less than perspicuous. But nothing in the unmistakability doctrine restricts a court to an examination of the statutory language in attempting to determine whether a legislature intended to make a contractual commitment. To the contrary, the decisions of this Court indicate that the history of a statute, its purpose, and the circumstances surrounding its enactment are all sources to which a court should look in attempting to discern the unmistakable meaning of the words used by a legislature.

In *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451 (1985), for example, this Court first examined the language of the statute at issue, *id.* at 466-67, but then looked to the context of its enactment to ascertain whether the government had intended to

enter into a contract with the plaintiffs. *Id.* at 468-70. Although this Court held that the statute did not "constitute a binding obligation of Congress," it based this conclusion on the fact that "neither the language of the statute *nor the circumstances surrounding its passage* manifest any intent on the part of Congress to bind itself contractually." *Id.* at 470 (emphasis added). Likewise, in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), this Court explained that a statute may be treated as a binding contract "when the language *and circumstances* evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* at 17 n.14 (emphasis added).[11]

In sum, even assuming that the unmistakability doctrine applies in determining whether and when contractual rights arise under a state retirement system, this Court should grant review to make it clear that the doctrine does

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[11] *See also Winstar*, 116 S. Ct. at 2449 (in determining whether the government intended to make a binding contractual commitment, this Court resolved an "ambiguity" in the documents alleged to have established a contract by examining the "realities of the transaction," and specifically cited the Restatement (Second) of Contracts § 202(1) (1981): "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight"); *id.* at 2477 (Scalia, J., concurring) ("[T]he [unmistakability] doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation. It is simply a rule of presumed (or implied-in-fact) intent . . . . [C]ontracts must be interpreted in a common-sense way against that [presumption]."); *General Motors Corp. v. Romein*, 503 U.S. 181, 188 (1992) (stating that, for purposes of Contracts Clause analysis, "the terms to which the contracting parties give assent may be express *or implied in their dealings*" (emphasis added)); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (interpreting legislative intent to make contractual commitment in "view of *the purpose and structure*" of the statute at issue (emphasis added)); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104 (1938) (examining both language of statute and context of statute's passage, including the "policy which induced the legislation," in holding that teachers had enforceable contract with school districts).

not bar inquiry into the history, purpose, and circumstances surrounding enactment of the system.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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